

Insights, News & Events

COMBATING THE FLU: RETAIL SECTOR EMPLOYERS AMONG MOST PRONE TO WORKPLACE DISRUPTIONS

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In most workplaces across the country, a perfect attendance record will be met with applause. Employees who “tough it out” and sneeze their way through the workday are congratulated, while those who stay at home to nurse an illness might be viewed as “slackers” and a burden to the company. This institutionalized mentality, however, can actually do more harm than good.

According to the Harvard Business Review, “presenteeism” – the problem of employees being on the job but, because of illness or other medical conditions, not fully functioning – can cut individual productivity by one-third or more. In fact, presenteeism can be much costlier to employers than absenteeism. It’s **estimated** that absent workers cost employers around \$150 billion annually, but those who come to work and are not fully productive, can cost employers roughly 10 times that amount.

A **recent study** conducted by researchers at Ball State University indicates this concern is elevated during periods of sustained economic growth like we’re experiencing now. The study found that a 1% increase in the employment rate correlates with increases in the number of influenza-related doctor visits by roughly 16%.

These concerns are particularly acute with flu season around the corner. Moreover, the retail sector is particularly susceptible to the crippling impact of a flu outbreak due to the high degree of interpersonal contact among employees and customers. For these reasons, retail employers should start devising plans to maintain productivity and keep the

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workplace flu-free. What are some factors you should be considering as part of this effort?

CAN MY COMPANY MAKE FLU VACCINES MANDATORY?

The CDC estimates that when employers require flu vaccinations, 85% of workers get one. When no such policy is in place, that number drops to 43%. While the numbers suggest that mandatory vaccination policies are the best line of defense against the flu, employers are encouraged to exercise caution when implementing such policies.

While it is permissible in most states to require your workforce to get vaccinated in order to stave off a flu outbreak before it even starts, each state treats the issue differently. In Ohio, for example, a [bill is currently pending](#) that would effectively bar employers from mandating that employees obtain vaccinations as a condition of employment.

In other states, certain employees (mainly healthcare workers) are required to get vaccinated. While such a requirement does not exist for employees in the retail sector, this does not mean retail employers are precluded from instituting a mandatory vaccination policy – absent a state-specific prohibition against such policies.

Besides checking to determine whether your state allows mandatory vaccination policies (check with counsel if you're unsure), here are some other factors to consider to ensure proper flexibility and to allow for exceptions under certain circumstances.

REQUESTS FOR ACCOMMODATION

Before implementing a mandatory vaccination policy, create a process by which employees can request accommodations. Employees need to know where to turn if they need to ask for an accommodation. It is also advisable to have forms for employees to fill out to request a waiver from any vaccination requirement.

WHEN MUST AN ACCOMMODATION BE GRANTED?

You have an obligation to accommodate disabilities or sincerely held religious beliefs. Remember that "religion"

and “disability” can be interpreted broadly under most federal and state laws. By **definition**, “religion” includes “all aspects of religious observance and practice, as well as belief.” Moreover, according to the Equal Employment Opportunity Commission (EEOC), protected religions are not limited to major, well-recognized faiths but also include “religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others.”

For example, a federal court in Ohio in 2012 addressed whether devotion to veganism could be deemed “religious.” The employee in *Chenzira v. Cincinnati Children’s Hospital Medical Center* was denied an accommodation and terminated after refusing the flu vaccine because it would violate her vegan practice of refraining from all animal products and by-products. The employer discounted her veganism as a dietary preference or philosophical notion, but the court disagreed.

The court pointed out that the plaintiff cited religious passages in her request for accommodation. The court held that it was plausible that the employee “could subscribe to veganism with a sincerity equating that of traditional religious views,” particularly since she is not alone in holding to that belief.

WHAT ACCOMMODATION MUST BE PROVIDED?

For an employee who declines to be vaccinated, the appropriate accommodation will depend on a variety of factors, including the nature of the employee’s position. Depending on the circumstances, appropriate accommodations may include modifying the employee’s work duties, finding an alternate version of the flu shot, transferring the employee to a vacant position, or providing a leave of absence. Once the accommodation is in place, you can continue working with the employee to make sure it remains effective and feasible.

WHAT DOES OSHA HAVE TO SAY ABOUT FLU VACCINATIONS?

The Occupational Safety and Health Act of 1970 (OSH Act) requires that employers provide their employees with working conditions that are free of known dangers. Encouraging flu vaccination for employees is one method of doing this.

OSHA does not specifically require employees to take vaccines, but [official OSHA guidance](#) provides that you may institute such a requirement. OSHA's guidance further provides that employees should be properly informed of the benefits of vaccinations. Employees who refuse vaccinations because of a reasonable belief that they have a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine) may be protected under Section 11(c) of the OSH Act pertaining to whistleblower rights.

WHAT ELSE CAN EMPLOYERS DO?

A mandatory flu vaccination policy may be too rigid or administratively undesirable for your particular workplace. Or, quite possibly, you are in a state that specifically precludes such policies. To the extent this is the case, there are many other tools available to employers to minimize workplace disruptions caused by the flu.

1. Encourage, but don't require, all employees to get a seasonal flu vaccine each fall.
2. Consider hosting a flu vaccine clinic at your workplace or provide resources to employees about where they can get a flu vaccine in their community.
3. Develop and review leave policies that encourage sick workers to stay at home without fear of any reprisals.
4. Advise all employees to stay home if they are sick until at least 24 hours after their fever is gone without the use of fever-reducing medicines. The [Center for Disease Control \(CDC\)](#) suggests employees should stay home for at least 24 hours after their fever (temperature of 100 degrees Fahrenheit) is gone. That's because those with the flu are most contagious during the first three days of their illness. The CDC further advises individuals with confirmed or even suspected flu should stay home from work at least four to five days after the onset of symptoms, even if they do not have a fever.
5. Ask sick employees to go home. Employees who appear to have a flu symptoms upon arrival, or who become sick during the workday, should be promptly separated from others and asked to go home.

6. Develop other flexible policies to allow workers to telework (if feasible) and create other leave policies to allow workers to stay home to care for sick family members or care for children if schools close. Flexible sick leave or telework policies can discourage employees who feel the need to fight through their symptoms, and, in turn, reduce the overall disruption to the workplace.
7. Provide resources and a work environment that promotes preventive actions to reduce the spread of flu. For example, provide tissues, no-touch trash cans, hand soap, and hand sanitizer.

CONCLUSION

Employees who get bogged down with the flu often think they're doing the employer a favor by "toughing it out" and coming into work. Even if employees are vaccinated, there is no foolproof way to completely eliminate the flu from the workplace, especially in the retail setting. Implementing sick leave policies and encouraging employees to utilize these policies can go a long way to mitigate any workplace disruptions this flu season.

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